UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WALDEN SECURITY, INC.	*		
Respondent,	*		
and	*	**Cases**	**14-CA-170110**
			18-CA-170129
UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA, INTERNATIONAL UNION JOINTLY WITH ITS MEMBER LOCALS 85, 86, 109, 110, 152, 161, 167, 173, 175, 220,	*		**16-CA-170337**
			15-CA-176496
Charging Party.	*		

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RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION

In September 2015, Respondent Walden Security was awarded a contract by the United States Marshals Service ("USMS") to provide security services for federal courthouses in the 5th and 8th Federal Judicial Circuits. Respondent set new initial terms and conditions of employment for the Court Security Officers ("CSOs") performing services under that contract that went into effect on December 1, 2015, the date Respondent took over operations from the predecessor contractor, Akal Security ("Akal"). The collective bargaining representatives of a number of CSO bargaining units in the 5th and 8th Circuits, the United Government Security Officers Association, International Union ("UGSOA" and the "International Union") jointly with its member Local Unions (the International Union and the UGSOA Local Unions are collectively referred to as the "Charging Party" or the "Union"), filed unfair labor practice charges asserting that Respondent was a "perfectly clear" successor to Akal and was therefore required to bargain before changing the employment terms and conditions that had been in effect under the predecessor employer. Administrative Law Judge Melissa M. Olivero held that Respondent was a "perfectly clear" successor to Akal. Respondent respectfully excepts from the ALJ's Decision in all material respects pursuant to Section 102.46 of the Board's Rules and Regulations.

In finding that Respondent fell into (what is supposed to be) the extremely narrow "perfectly clear" exception to the general rule protecting a successor employer's freedom to set new initial employment terms, Judge Olivero applied that exception in an "exceedingly rigid and formalistic manner that does not do justice to the unique facts of this case, especially the nature of Respondent's hiring process." *Creative Visions Resources, LLC*, 364 NLRB No. 91, slip op. at 10 (2016) (Member Miscimarra, dissenting). Judge Olivero, relying upon an incomplete record that did not include material facts relating to Respondent's hiring process, focused

exclusively on selected portions of a single communication – a banal letter of introduction to the company – that Respondent had distributed to Akal's employees. The ALJ found that this generic announcement and introduction, referred to in this case as the "transition letter," indicated an intent on Respondent's part to retain all of the predecessor's employees.

Judge Olivero's conclusion, based exclusively on a handful of inartfully drafted phrases which no reasonable person would take literally, inappropriately treats "'perfectly clear' successor law" as a "legal trap" (*id.* at n.7) and disregards the portion of the transition letter which indicated that Respondent intended to offer changed employment terms to the predecessor's employees. It also ignores a contemporaneous communication – which, according to the record evidence, may have been distributed together with, or even prior to, the transition letter – which specified that predecessor employees would need to apply for employment with Respondent and further indicated that employment with Respondent would entail different terms and conditions than what had been in effect under Akal. Thus, in finding that the General Counsel met its burden of proving that Respondent was a "perfectly clear" successor on this record, the ALJ misconstrued the evidence and misapplied the law.

Judge Olivero's decision can be upheld only by ignoring additional evidence of the other stages of Respondent's hiring process, unfortunately omitted from the Stipulated Record before the ALJ but now the subject of Respondent's accompanying Motion to Reopen and Supplement the Record with Further Evidence, which shows that the lone communication on which the ALJ relied was but a minor part – indeed, the *least* significant part – of a chain of events starting a year earlier and culminating with Respondent's taking over operations on December 1, 2015. When that single communication is considered in its proper context within the full sequence of relevant events and Respondent's hiring process, the ALJ's determination cannot stand because

there plainly was not any adverse reliance induced by Respondent that would support application of the "perfectly clear" exception. In reality, Respondent undertook no act or omission that warranted forfeiture of its essential right to set initial employment terms upon taking over operations in the 5th and 8th Circuits from Akal.

First, from the moment Respondent announced that it had been awarded the contract for the 5th and 8th Circuits, the Union and its members were *already* on notice that Respondent would likely set new initial employment terms. The Union – and, therefore, its members – received a clear and unambiguous "portent" of Respondent's intentions several months earlier when Respondent set new initial employment terms upon taking over the CSO contract for the *6th* Circuit. Respondent had been awarded the CSO contract for the 6th Circuit in December 2014 and took over operations from the predecessor contractor (also Akal) on February 1, 2015. Several bargaining units in the 6th Circuit were represented by the same International Union as the bargaining units in the instant case and they, with the International Union, even filed ULP charges (which were eventually withdrawn) asserting, just like the instant charges, that Respondent's actions were unlawful because Respondent was a "perfectly clear" successor to Akal in the 6th Circuit. In light of the International Union's experience with Respondent in the 6th Circuit, it is simply not plausible – and objectively unreasonable to claim – that Akal's employees in the 5th and 8th Circuits could have harbored a patently groundless belief that Respondent was going to retain all Akal employees without setting new employment terms for them. This alone establishes that Respondent was not a "perfectly clear" successor to Akal in the 5th and 8th Circuits.

Second, even if Respondent's actions in the 6th Circuit were not a sufficient portent of changed employment terms for the 5th and 8th Circuit employees, the Union's knowledge of

those actions certainly must be taken into consideration when analyzing the subsequent communications and events at issue here. In other words, to the extent the transition letter, on its face, contained any ambiguity as to Respondent's intentions, the knowledge of Respondent's actions in the 6th Circuit easily clarified that ambiguity on the side of new initial employment terms.

Third, within a few days after distributing the transition letter and town hall meeting notices discussed above, Respondent commenced a series of town hall meetings at which Akal employees were informed that Respondent was not assuming Akal's collective bargaining agreements and was not going to maintain the terms and conditions contained in those agreements. At those meetings, Respondent also provided information about the changed employment terms that it was implementing, and it gave the predecessor's employees the opportunity to apply for employment with Respondent. The first town hall meeting, according to the record, was held no more than four days after the first transition letters and meeting notices were distributed. Thus, even assuming, *arguendo*, that those pre-meeting communications somehow generated confusion on the part of Akal's employees as to Respondent's intentions regarding their continued employment – and, to be sure, such confusion would necessarily mean it was not "perfectly clear" to those employees that Respondent would hire them without changing their employment terms – that confusion was eliminated only four (or fewer) days later at the first town hall meeting.

Those town hall meetings continued on 8 out of 9 consecutive days, then resumed two weeks later and were held on 10 consecutive days. The first town hall meeting occurred more than 10 weeks – and the last town hall meeting occurred more than 5 weeks – *before* Respondent took over operations – *i.e.*, before a single predecessor employee became an employee of

Respondent. In short, there was plainly no attempt to mislead by affirmative act or by inference on Respondent's part; rather, Respondent went to great lengths to inform the Union and its members throughout the 5th and 8th Circuits as to its plans and the changed employment terms and conditions that would apply to CSOs under Respondent, and it did so well before any employee would actually be hired.

Fourth, only a few days after the last town hall meeting, still over a month before commencing operations, Respondent distributed offer letters to those Akal employees who had been selected for employment with Respondent. The offer letter reiterated that Respondent was not adopting nor adhering to the terms of Akal's CBAs, and instead would be setting new initial employment terms which were contained in an enclosed "Policies & Procedures" document. Thus, nearly 5 weeks before Respondent actually commenced operations as Akal's successor, the predecessor's employees who were invited to accept employment with Respondent were explicitly informed that the offer was based on changed terms and conditions of employment.

Thus, Respondent's intent to set new initial employment terms was demonstrated to the Union and its members by its actions in the 6th Circuit; it was indicated in the transition letter and meeting notices that were distributed prior to the town hall meetings; it was explicitly stated and demonstrated at the town hall meetings; and it was explicitly communicated again – along with a document setting forth in detail the new terms and conditions – to those predecessor employees who received an offer of employment from Respondent. Based on these facts, there is no basis whatsoever for applying the "perfectly clear" exception in this case.

Even without considering the additional evidence that was omitted from the Stipulated Record before the ALJ, however, Judge Olivero's decision must be reversed. The burden of proving that Respondent was a "perfectly clear" successor is a very heavy one and the General

Counsel did not meet that burden on the existing record. Regardless of whatever else they may have contained, the pair of barebones communications (on which the ALJ based her entire decision) which informed predecessor employees that information about the successor employer's "benefits package" and "policies" would be provided at an imminent town hall meeting where those employees would have the chance to apply for employment with the successor, unquestionably "portended" employment under different terms and conditions. That was sufficient for Respondent to retain its *Burns* right to set initial new initial employment terms and avoid the "perfectly clear" exception.

Finally, the ALJ separately erred in holding that the Union's knowledge of the Respondent's intent to change the unit description for each of the units involved herein did not constitute separate and independent grounds for holding that Respondent was not a "perfectly clear" successor. The record left no question that the Union expected Respondent to seek to remove certain classifications from each unit description for the UGSOA-represented bargaining units in 5th and 8th Circuits, just as it had done in the 6th Circuit. Thus, the Union could not have been – and in fact was not – lulled into expecting unchanged employment terms, thereby precluding application of the "perfectly clear" exception.

II. STATEMENT OF THE CASE

A. General Background[1]

Respondent Walden Security ("Respondent" or "Walden") has a number of contracts with the United States Marshals Service ("USMS") to provide Court Security Officer services for federal courthouses in several federal judicial circuits. (GC Ex. 1(o), ¶ 2A, and 1(q).) This case concerns employees performing services under Respondent's contracts for the 5th and 8th Circuits. Respondent was awarded the 5th and 8th Circuit contracts by the USMS on or around September 11, 2015[2], and took over operations on December 1, 2015. (GC Ex. 1(o), ¶ 3G.)

Prior to that date, a predecessor employer, Akal Security, Inc. ("Akal"), provided substantially the same court security officer services for the USMS at the federal courthouses in the 5th and 8th Circuits. (GC Ex. 1(o), ¶¶ 3A and 3G.) Most of the CSOs employed by Akal were jointly represented for purposes of collective bargaining in a number of bargaining units by the UGSOA International Union as well as various UGSOA-member Local Unions (when referred to collectively, the International Union and the relevant UGSOA Local Union(s) are hereinafter referred to as the "Union"). (GC Ex. 1(o), ¶¶ 6B-E, 7B-E, 8B-E, 9B-E, 10B-E, 11B-E, 12B-E, 13B-E, 14B-E, 15B-E, 16B-E; GC Ex. 1(q).) The terms and conditions of employment for these CSOs were contained in separate collective bargaining agreements, for each unit, between Akal and the unit's bargaining representatives – both the particular UGSOA Local Union and the International Union. (SOF ¶5K, GC Ex. 1(o), ¶¶ 6-16.) Up until the time Respondent took over operations under the 5th and 8th Circuit contracts on December 1, 2015,

[1] Records citations are to the Joint Motion and Stipulations of Fact ("SOF"), General Counsel's Exhibits ("GC Ex.") and joint exhibits ("JT").

[2] *See* Affidavit of Mick Sharp, sworn to October 9, 2017, at ¶ 9, submitted in connection with Respondent's Motion to Reopen and Supplement the Record with Further Evidence as Respondent's Proposed Ex. A (hereinafter cited as "Sharp Aff.").

each Union-represented bargaining unit had been covered by a collective bargaining agreement between Akal and the Union which had been effective October 1, 2015. (*Id.*)

Even before Respondent was awarded the 5th and 8th Circuit contracts by the USMS, Respondent was already performing the same CSO services for the USMS at federal courthouses in the 6th Circuit pursuant to a separate contract with the USMS. Respondent had been awarded the 6th Circuit contract for CSO services on or around December 9, 2014, and took over operations under that contract on February 1, 2015. (Sharp Aff., ¶ 3.) Prior to Respondent's taking over that contract, the UGSOA International Union and other UGSOA Local Unions had represented bargaining units comprised of CSOs assigned to certain courthouses in the 6th Circuit. (Sharp Aff., ¶ 6.) As later was the case in the 5th and 8th Circuits, those UGSOA-represented bargaining units in the 6th Circuit were each covered by collective bargaining agreements between the predecessor 6th Circuit contractor, which also was Akal, and the Union (both the UGSOA International Union and their particular UGSOA Local Union), until Respondent's commencement of operations under the 6th Circuit contract on February 1, 2015. (*Id.*)

Respondent did not assume Akal's CBAs in the 6th Circuit when it took over that contract. (Sharp Aff., ¶ 7.) Rather, prior to its commencement of operations on February 1, 2015, Respondent undertook a transition process that was substantially similar to the one it undertook in the 5th and 8th Circuits. (*Id.* at ¶¶ 5, 9.) Respondent's representatives held town hall meetings at locations in each Federal District within the 6th Circuit at which the predecessor's employees were provided information about the process of transitioning the USMS contract from Akal to Respondent as well as new employment policies and benefits that would be implemented by Respondent. (*Id.* at ¶¶ 5, 10-11.) The predecessor employees also were

invited to submit employment applications at the town hall meetings. (*Id.*) Subsequently, qualified and approved applicants received offer letters from Respondent and were also provided copies of Respondent's Policies & Procedures document, a manual setting forth the terms and conditions of employment that would go into effect on February 1, 2015, which was identical in all material respects to the 5th and 8th Circuits Policies & Procedures document that Respondent distributed to the predecessor's employees when they received their offer letters (as discussed in more detail below) (*See* Sharp Aff., ¶¶ 5,7; SOF ¶ 5Q; JT 3.)

Respondent unilaterally implemented new initial terms and conditions of employment with respect to the UGSOA-represented CSOs in the 6th Circuit on February 1, 2015. (Sharp Aff., ¶ 7.) In August and September 2015, the International Union and the affected Local Unions filed unfair labor practice charges alleging that Respondent was a "perfectly clear" successor to Akal and, as such, had unlawfully failed to bargain over changes to the terms and conditions that had been in effect under the predecessor contractor. (Sharp Aff., ¶ 8; Respondent's Proposed Ex. B.[3]) Those charges were ultimately withdrawn, and subsequently, as stated in the Stipulated Record, Jeff Miller, the International Union's Director, negotiated new collective bargaining agreements covering the UGOSA Local Unions in the 6th Circuit. (Sharp Aff., ¶ 8; SOF ¶ 5M.)

As for the 5th and 8th Circuits, Respondent was awarded the CSO contract by the USMS on or about September 11, 2015. (Sharp Aff., ¶ 9.) As set forth in the Stipulated Record, between September 15 and October 8, 2015, Respondent distributed the "transition letter" to Akal's employees in the 5th and 8th Circuits. (SOF ¶ 5A.) During the same period, Respondent also distributed notices for town hall meetings to be held for each 5th and 8th Circuit district which were virtually identical to one another except for the location, date and time of the

[3] Respondent's Proposed Ex. B, submitted in connection with its Motion to Reopen and Supplement the Record with Further Evidence, consists of the above-referenced ULP charges as well as the letters confirming the Union's withdrawal of those charges.

meeting. (SOF ¶ 5D; JT 2(a)-2(aa).) For two bargaining units (the Des Moines Unit and the West Texas Unit), the transition letter was distributed to employees before the town hall meeting notice was distributed to those employees, although there is no evidence in the record establishing how much earlier the transition letter was distributed before the meeting notice.[4] (SOF ¶ 5E.) For all of the remaining units, the record does not indicate whether the transition letter was distributed before, simultaneously with, or after the town hall meeting notices were distributed to the Akal employees. (SOF ¶ 5F.)

The transition letter was a generic letter of introduction from Respondent's President and its Chairman and C.E.O., apprising CSOs in the 5th and 8th Circuits that Respondent had been chosen by the USMS to administer the CSO contract for those circuits starting December 1, 2015. (SOF ¶ 5C; JT 1.) The letter was not individually addressed and did not affirmatively offer employment to anyone. While it stated that the reader has "joined" a premier security company, offered a "welcome" to the company, and expressed Respondent's aspiration for the "administrative management of the workforce to be seamless and remain constant," it also promised that the company "will be providing you much more information about Walden Security in the weeks ahead" which would include, *inter alia*, Respondent's "benefit package details" and "policies." (JT 1.)

As for the town hall meeting notices, after an exhortation to the reader to "Join Our Team!" the notice announced a "CSO Town Hall Meeting" for "all CSOs in the [name of city] area." (SOF ¶ 5D; JT 2(a)-2(aa).) The notice stated:

> In the town hall session, you will meet the Walden Security team, learn about our company, training, and benefits, complete an employment application, ask questions and more.

(*Id.*)

[4] As noted *supra*, the Des Moines Unit is no longer part of this case.

The notice then advised CSOs as to "what to bring" to the meetings, with a list of specific identification documents and credentials. (*Id.*)

The town hall meetings were held in close succession. A series of town hall were held in various locations in Texas on all days but one from September 19 through September 27. (JT 2 at 2(a)-2(j).) Additional meetings were held in Iowa, Louisiana, Missouri, Arkansas, and certain Texas locations again, each day from October 9 through 19. (JT 2 at 2(k)—2(aa).) In some locations, more than one meeting was held on a single day and/or meetings were held on successive days. (JT 2.)

At these town hall meetings, just as at the town hall meetings in the 6th Circuit the previous year, Akal's employees were provided information about the process of transitioning the USMS contract from Akal to Respondent as well as new employment policies and benefits that would be implemented by Respondent. (Sharp Aff., ¶¶ 5, 9, 11-12; Resp. Prop. Ex. C.[5]) At every one of these town hall meetings, a Walden representative informed attendees that Respondent was not assuming the CBA between Akal and their Unions, and that Respondent would implement new terms and conditions of employment upon commencement of operations on December 1, 2015. (Sharp Aff., ¶ 11.)

The predecessor employees were invited to submit employment applications at the town hall meetings. (*Id.*) Subsequently, qualified and approved applicants received offer letters from Respondent and were also provided copies of Respondent's "Policies & Procedures" document for the 5th and 8th Circuits. (Sharp Aff., ¶¶ 12-13; Resp. Prop. Ex. D[6]; *see also* JT 3.)

[5] Respondent's Proposed Exhibit C, submitted in connection with the accompanying Motion to Reopen and Supplement the Record with Further Evidence, is a copy of a PowerPoint presentation regarding details of Respondent's benefit offerings, given by Respondent's representatives at each town hall meeting.

[6] Respondent's Proposed Exhibit D is a copy of the standard form offer letter, dated October 23, 2015, that Respondent sent to each Akal employee selected for employment with Respondent.

Effective December 1, 2015, Respondent implemented new initial terms and conditions of employment for CSOs in the 5th and 8th Circuits. (SOF ¶ 5Q.) Those terms and conditions included the terms set forth in the Policies & Procedures document (JT 3) as well as the compensation and benefits presented at the town hall meetings.

B. The Underlying Charges

The Charging Party filed unfair labor practice ("ULP") charges against Respondent in early 2016 in Regions 14, 15, 16 & 18 alleging that Respondent is a "perfectly clear" successor that was prohibited from changing the terms and conditions of employment existing under the predecessor employer without first bargaining with the Charging Party. (GC Exs. 1(a)-(h).) Those complaints were consolidated by order dated July 26, 2016 in Region 14 for disposition by Judge Olivero. (GC Ex. 1(i)-1(n), 1(o).)

C. The Record

The parties jointly stipulated to a record upon which the ALJ was to render a decision on the consolidated charges. (*See* Joint Motion and Stipulation of Facts.) In pertinent part, the stipulated record contained the transition letter (JT 1), the town hall meeting notices (JT 2(a)-2(aa)), and Respondent's Policies & Procedures document (JT 3).

Other highly relevant evidence bearing directly on the material issues in this case, which was discussed in the recitation of material facts above, was omitted from the Stipulated Record and is the subject of Respondent's accompanying Motion to Reopen and Supplement the Record with Further Evidence. That evidence includes the relevant history pertaining to Respondent's previously taking over the CSO contract for the 6th Circuit (the Sharp Affidavit, marked as Resp. Prop. Ex. A), the ULP charges filed (and withdrawn) by the International Union and its member Local Unions alleging that Respondent was a "perfectly clear" successor to Akal in the 6th Circuit (Resp. Prop. Ex. B); a PowerPoint presentation dated August 2015 concerning

Respondent's employee benefit offerings which was shown to and discussed with the predecessor employees who attended the town hall meetings held between September 19 and October 19 (Resp. Prop. Ex. C); and the standard form offer letter, dated October 23, 2015, which was provided along with a copy of the Policies & Procedures document to all individuals who were invited to accept for employment with Respondent in the 5th and 8th Circuits (Resp. Prop. Ex. D).

D. The ALJ's Decision

On July 7, 2017, the ALJ issued her decision, holding that Respondent was a "perfectly clear" successor to Akal and, as such, was required to bargain with the Charging Party prior to changing the terms and conditions of employment in place under the predecessor employer. In reaching that conclusion, the ALJ relied solely upon the transition letter which, in her view, constituted an expression of intent to hire all predecessor employees on the same terms and conditions as those in effect under the predecessor employer. Based on that holding and the fact that Respondent set its own initial terms and conditions of employment, the ALJ found that Respondent violated Sections 8(a)(5) and (1) of the Act. The ALJ also found that the Union's assumption that Respondent intended to seek a change in the unit description for each bargaining unit, by removing certain classifications from the unit, did not preclude application of the "perfectly clear" exception.

E. Developments Since The ALJ's Decision

On September 20, 2017, the Regional Director for Region 14 issued an Order approving the withdrawal of allegations and dismissal of the Consolidated Complaint as to four of the Charging Party Local Unions (Locals 110, 152, 161, and 167) pursuant to a settlement between Respondent and those four Locals. These Local Unions have also been referred to as the Middle

Louisiana Unit, the Southern Iowa-Davenport Unit, the Southern Iowa-Des Moines Unit, and the West Arkansas Unit.

III. ARGUMENT

A. Based on all of the relevant facts, Respondent was not a "perfectly clear" successor under *Burns* and *Spruce Up*.

1. Under the appropriate legal standard, the "perfectly clear" exception is extremely narrow and the General Counsel carries a heavy burden to prove that a successor employer has forfeited its *Burns* right to set new initial terms and conditions of employment.

In *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), the Supreme Court held that an employer becomes a legal successor when it continues the operations of a unionized predecessor in substantially unchanged form and hires as a majority of its workforce the predecessor's union-represented employees. Under these circumstances, the successor must recognize, upon request, and bargain in good faith with the unit employees' incumbent bargaining representative. Notwithstanding this recognition obligation, however, *Burns* held that a legal successor is *not* obligated to maintain the employment terms in effect under its predecessor: rather, a successor "is ordinarily free to set initial terms on which it will hire the employees of a predecessor." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 40 (1987) (quoting *Burns*, 406 U.S. at 294). "The *Burns* Court accorded much importance to a successor employer's freedom to alter[,] even remake the entire enterprise. Certainly that includes the ability ordinarily to set initial employment terms and conditions without preliminary bargaining with an incumbent union." *Machinists v. NLRB*, 595 F.2d 664, 673 (D.C. Cir. 1978). (Exceptions, ¶¶ 3-8).

The *Burns* Court grounded its decision on important policy considerations that support conferring successor employers with the freedom to set initial terms and conditions of employment, and also perceived serious undesirable consequences that would flow from the imposition of a predecessor's employment terms on its successor:

> [H]olding either the union or the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital. On the other hand, a union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm. The congressional policy manifest in the Act is to enable the parties to negotiate for any protection either deems appropriate, but to allow the balance of bargaining advantage to be set by economic power realities. Strife is bound to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.

Burns, 406 U.S. at 287.

After establishing the strong policy justifications for granting successor employers the freedom to set new initial employment terms, the *Burns* Court then described the rare and exceptional circumstances in which this general rule would not apply and a successor would be required to first "consult with" the incumbent union before making any changes to employment terms and conditions:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by Section 9(a) of the Act, 29 U.S.C. §159(a).

Id. at 294-95. In short, the Court made clear that saddling a successor employer with the terms of its predecessor's collective bargaining agreement should be the exception and not the rule.

The task of delineating the parameters of this narrow exception to the *Burns* rule was taken up by the Board in *Spruce Up Corp.*, 209 NLRB 194 (1974), *enfd.* 529 F.2d 516 (4th Cir. 1975). In *Spruce Up*, prior to starting operations, the successor employer announced a general

willingness to retain the predecessor's workforce, but at the same time indicated that he planned to adopt a new pay plan for those employees. *See id.* The Board rejected the argument that the successor's stated intent to retain the predecessor's workforce made it a "perfectly clear" successor, holding that it cannot "fairly be said that the new employer 'plans to retain all of the employees in the unit,' as that phrase was intended by the Supreme Court," when he announces new terms prior to or simultaneously with his invitation to the predecessor's work force to accept employment under those terms. *Spruce Up Corp.*, 209 NLRB at 195. The Board based this determination on its view that a more broadly defined "perfectly clear" exception to the *Burns* general rule

> would be subject to abuse, and would, we believe, encourage employer action contrary to the purposes of this Act and lead to results which we feel sure the Court did not intend to flow from its decision in *Burns*. For an employer desirous of availing himself of the *Burns* right to set initial terms would, under any contrary interpretation, have to refrain from commenting favorably at all upon employment prospects of old employees for fear he would thereby forfeit his right to unilaterally set initial terms, a right to which the Supreme Court attaches great importance in *Burns*. And indeed, the more cautious employer would probably be well advised not to offer employment to at least some of the old work force under such a decisional precedent. We do not wish-nor do we believe the Court wished-to discourage continuity in employment relationships for such legalistic and artificial considerations.

Id. at 195.

Based on that rationale, the Board articulated the parameters of the extremely limited "perfectly clear" exception, holding that it

> should be restricted to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer … has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.

Id. (Exceptions, ¶ 9.)

As the Board and courts have recognized, the purpose of the "perfectly clear" exception is to protect individual predecessor employees from erroneously believing they would enjoy continued employment with the successor employer on the same terms and conditions of employment that were being maintained by the predecessor where that erroneous belief is based on the successor employer's misleading acts or omissions. (Exceptions, ¶ 12). This protection is deemed to be warranted because such misled or under-informed employees would typically lose the opportunity to seek other employment which they might have done if they had been aware of the changed employment terms being implemented by the successor employer. In other words, "at bottom the 'perfectly clear' exception is intended to prevent an employer from inducing possibly adverse reliance upon the part of employees it misled or lulled into not looking for other work." *S&F Market Street Healthcare v. NLRB*, 570 F.3d 354, 359 (DC Cir. 2009); *Int'l Assn. of Machinists and Aerospace Workers, AFL-CIO v. NLRB*, 595 F.2d 664, 673 at n.45 (D.C. Cir. 1978) (observing that in applying the *Spruce Up* test "the relevant factor is the degree of likelihood that incumbents will work for the successor"); *Creative Vision Resources LLC*, 364 NLRB No. 91, slip op. at 6 (2016) ("As the Board has observed, '[t]he *Spruce Up* test focuses on gauging the probability that employees of the predecessor will accept employment with the successor.'") (quoting *Road & Rail Services, Inc.*, 348 NLRB 1160, 1162 (2006); *Paragon Systems, Inc.*, 364 NLRB No. 75, slip op. at 2-3 (2016) (successor did not meet the "perfectly clear" exception where there was no evidence that the predecessor's employees would be misled into believing that [the successor] was offering them employment with unchanged terms and conditions.").

There is no question that some subsequent Board decisions have attempted, overtly and otherwise, to expand the parameters of the "perfectly clear" exception established by *Spruce Up*

by imposing increasingly stringent demands on employers who seek to exercise their rights under *Burns* (to the point where in some instances the exception appears to have swallowed the *Burns* general rule). But a proper reading of *Burns*, *Spruce Up*, and their progeny makes clear that *very little* is required of a successor employer for it to retain its *Burns* right to set new initial employment terms. (Exceptions, ¶¶ 14-15). Specifically, all that is required is a mere "portent of employment under different terms and conditions." *Creative Vision Resources,* LLC, 364 NLRB No. 91, slip op. at 11-12 (Miscimarra, dissenting) (quoting S*&F Market Street Healthcare*, 570 F.3d at 354); *Ridgewells, Inc.*, 334 NLRB 37 (2001), *enf'd*. 38 Fed. Appx. 29 (D.C.Cir. 2002) (same). The successor employer need only portend – *i.e.*, put the predecessor's employees on notice – that continued employment with the successor employer will be on changed terms and conditions.

Finally, it bears noting that the burden falls upon the General Counsel to prove, affirmatively, that a successor employer forfeited its *Burns* right by act or omission and therefore falls within the ambit of the narrow "perfectly clear" successor exception. (Exceptions, ¶ 4). With respect to the *Spruce Up* test, this means that the General Counsel carries the burden of proving that an employer failed to "portend" new initial employment terms before inviting predecessor employees to accept employment; it is not the successor employer's burden to prove that it did provide such a portent. (Exceptions, ¶ 15). Thus, as noted in Chairman (then-Member) Miscimarra's dissent in *Creative Vision Resources, LLC*, "[a]ny lack of precision in the record about who received notice and when is a failure of proof by the General Counsel" who carries the burden of proving that the employer was a "perfectly clear" successor at the time it unilaterally set employment terms. 364 NLRB No. 91, slip op. at 12 n.9 (Member Miscimarra, dissenting). Stated differently, the General Counsel must establish either that a particular

communication failed to portend new employment terms before the employer expressed an intent to retain all predecessor employees, or that the communication actively misled employees into believing that they would be hired without any change to the predecessor's terms and conditions of employment.

2. Respondent never forfeited its *Burns* right to unilaterally set new initial terms and conditions of employment.

The ALJ's determination that Respondent was a "perfectly clear" successor to Akal can only be sustained by applying that erstwhile narrow exception in an "exceedingly rigid and formalistic manner that does not do justice to the unique facts of this case, especially the nature of the Respondent's hiring process." *Creative Vision Resources, LLC*, 364 NLRB No. 91, slip op. at 10 (2016) (Member Miscimarra dissenting). As then-Member Miscimarra observed regarding the successor employer in that case, here too the relevant evidence shows that Respondent's hiring was "in a state of flux" through the point of extending actual invitations to accept employment. *Id.* (Exceptions, ¶ 20). At no time prior to that moment did Respondent mislead Akal employees into believing that they would be retained on the same terms and conditions, and by the time Respondent did extend offers of employment it had already provided clear notice to Akal employees that their continued employment would be on changed terms and conditions. (Exceptions, ¶ 21).

a. The Union had notice that Respondent intended to set new initial terms and conditions of employment because that is precisely what Respondent did in the 6th Circuit, even before Respondent took over the 5th and 8th Circuit contracts, where the same Union represented the same class of employees.

By the time Respondent was awarded the CSO contracts for the 5th and 8th Circuits by the USMS, the Union had at least a "portent" if not actual notice that Respondent intended to set new initial employment terms upon taking over that contract. (Exceptions, ¶ 22). As discussed

above, after being awarded the contract for the 6th Circuit, Respondent implemented a transition process that was virtually identical to the transition process undertaken in the 5th and 8th Circuits. (Sharp Aff., ¶ 9.) (Exceptions, ¶ 23). Namely, Respondent announced and shortly thereafter held town hall meetings for the predecessor employer's CSOs where they were: advised that Respondent would not be assuming nor applying the terms of any CBAs that the Union may have had with the predecessor contractor; provided information about Respondent's policies and benefits; and given the opportunity to apply for positions with Respondent. (Sharp Aff., ¶ 5.) (Exceptions, ¶ 23). When Respondent commenced 6th Circuit operations on February 1, 2015, it unilaterally implemented employment terms and conditions for CSOs formerly employed by Akal including those represented by the International Union which were set forth in a Policies & Procedures document for the 6th Circuit that was substantially identical to the Policies & Procedures document subsequently distributed to 5th and 8th Circuit employees. (Sharp Aff., ¶¶ 6-8, 13.)

A few months after Respondent took over operations of the 6th Circuit contract on February 1, 2015, the Union filed ULP charges against Respondent alleging, just as it alleged here, that Respondent was a "perfectly clear" successor to the predecessor contractor and therefore was obligated to negotiate any departures from the terms and conditions in effect under the predecessor. (Sharp Aff., ¶ 8; Resp. Prop. Ex. B.) Specifically, one such charge claimed:

> In February of 2015, Walden Security became the perfectly Clear Successor [sic] to a federal contract issued by the United States Marshal [sic] Service. The Predecessor was Akal Security, Inc. Since on or about 06-22-2015, the employer, a perfectly clear success, has failed to pay for the time required to complete a medical follow up physical required of a member of the Union.

The other two charges contain essentially the same allegations that Respondent was a "perfectly clear" successor to Akal in the 6th Circuit and therefore had unlawfully failed to bargain over changes to the employment terms in effect under Akal.

In the context of successorship law, the Board has held that the union's knowledge of an employer's intentions may be imputed to its members. *See Marriott Management Services, Inc.*, 318 NLRB 144, n.1 (1995) ("In these circumstances, we regard the communications to Local 70 as communications with the employees through their representative."); *Elf Atochem, Inc.*, 339 NLRB 796, n.3 (2000) ("In 'perfectly clear' successor cases, communications with the employees' union are regarded 'as communications with the employees through their representative.'") (quoting *Marriott Management Services, Inc., supra*). Here, by September 2015, the Union – and therefore its members – had notice that the same employer that was taking over the 5th and 8th Circuit contracts had taken over the 6th Circuit contract seven months earlier. Thus, the Union and its 5th and 8th Circuit members had notice that this was the exact same set of circumstances that existed in the 6th Circuit – it was essentially the same contract with the same federal agency to provide the same services with the same classification of employees (CSOs). (Exceptions, ¶ 46). More importantly, the Union and its members had notice that in the 6th Circuit situation, Respondent had rejected the employment terms that had been in effect under the predecessor and had set new initial employment terms unilaterally. (Exceptions, ¶ 47). That notice clearly provided a "portent" that Respondent would follow the exact same course in the 5th and 8th Circuits even prior to receiving any information from Respondent specific to the 5th and 8th Circuits. (Exceptions, ¶ 47). It was therefore not at all "perfectly clear" that Respondent would retain the predecessor's workforce with no changes to their

employment terms. This fact, by itself, is sufficient to preclude application of the "perfectly clear" successor exception.

b. The Hiring Process for the 5th and 8th Circuits did not induce any adverse reliance by Akal employees because they were never misled or uninformed about Respondent's intent to set new initial terms and conditions.

In finding that Respondent was a perfectly clear successor, the ALJ solely relied upon a pair of communications from Respondent to employees – a "transition letter" and a town hall meeting notice. (JT 1 and JT 2(a)-2(aa).) (Exceptions, ¶ 50). The contents of those communications, when considered in context – *i.e.*, with the knowledge of what had occurred in the 6th Circuit and the ensuing town hall meetings – do not provide any support for application of the "perfectly clear" successor exception. (Exceptions, ¶ 51).

First, the transition letter itself does not indicate an intent to hire all Akal employees on the same employment terms as those that were in effect under Akal. (Exceptions, ¶ 53). In reaching a contrary conclusion, the ALJ focused on the letter's expression of "welcome" and reference to "joining" Respondent. (Exceptions, ¶ 54). However, the transition letter also, as the ALJ found, stated that in the coming weeks Respondent would be providing Akal employees with information about its policies and benefit package details. (Exceptions, ¶¶ 59, 62). Clearly, if Respondent intended to maintain the predecessor's policies and benefits, there would be no reason to provide information about its own policies and benefits. The obvious inference from this statement in the letter is that Respondent was going to be implementing *changed* policies and benefits – *i.e.*, new initial employment terms. (Exceptions, ¶ 60). Only by disregarding the plain meaning of these basic words could the ALJ fail to recognize that this statement provided a sufficient portent of new employment terms to the predecessor's employees. (Exceptions, ¶ 63).

When considered in light of the 6th Circuit experience, moreover, it is simply not possible that the Union – or its members – could have interpreted the letter in any other manner. The International Union had just filed ULP charges over Respondent's unilateral implementation of new initial terms in the 6th Circuit, and now its members were receiving a letter from the same employer stating that Respondent would be providing information about *its* policies and benefits. A reasonable inference – if not the *only* plausible inference – that the Union and its members could draw when they received the transition letter was that Respondent was going to be implementing its own policies and benefits in the 5th and 8th Circuits just as it had done in the 6th Circuit. (Exceptions, ¶ 61). Indeed, the Union's International Director even stipulated that he "assumed" Respondent would repeat itself in seeking to remove certain classifications from the 5th and 8th Circuit bargaining units just as it had proposed in the 6th Circuit. (SOF ¶ 5M, 5N.) Thus, the Union was fully cognizant of Respondent's actions in the 6th Circuit when the 5th and 8th Circuit transition process commenced.

At a minimum, even if it could be said that a CSO in the 5th or 8th Circuit might have some uncertainty about Respondent's plans after reading the transition letter, that uncertainty by definition means that it was *not* "perfectly clear" that Respondent intended to retain all predecessor employees on the same terms and conditions that they enjoyed under Akal. (Exceptions, ¶ 62). Rather, that uncertainty in and of itself left open the possibility of new terms and conditions of employment – *i.e.*, it provided a "portent" of changed initial employment terms. (Exceptions, ¶ 63).

That conclusion is reinforced by the town hall meeting notice. As an initial matter, the meeting notice must be read together with the transition letter because, except for one of the seven bargaining units remaining in this case, there is no record evidence establishing the

sequence in which the transition letter and the town hall meeting notices were distributed to or received by Akal's employees. (SOF ¶ 5E.) (Exceptions, ¶ 70). The General Counsel failed to establish whether the transition letter and meeting notice were received together or separately and, if it was the latter, in what sequence. As a result, the Board may assume that the town hall notice was distributed with or even prior to the transition letter. (Exceptions, ¶ 69). The meeting notice precludes any doubt as to whether Akal's employees had notice that Respondent intended to set new initial employment terms. (Exceptions, ¶ 71). As the ALJ correctly observed, the "notices stated that at the town hall meetings, employees would meet Respondent's team, learn about the company, training and benefits, complete an application and ask questions." (ALJ Decision at 12.) Thus, the notices confirmed that Respondent would be setting new initial terms and conditions with respect to benefits because, again, there would be no reason to provide information to Akal employees about Respondent's benefits unless those benefits were going to be different from Akal's. (Exceptions, ¶ 76). The notices also established that the transition letter did not guarantee employment retention of Akal's entire workforce because the notice informed Akal employees that they would need to complete an employment *application* in order to be considered by Respondent, and provided a list of documentation that each applicant would need to present in order to apply. (Exceptions, ¶ 77).

In short, the affected Akal employees (except for those in the West Texas Unit) received two communications from Respondent, possibly simultaneously, with one promising that information about Respondent's policies and benefits would be forthcoming and the other specifying that this information would be provided at a meeting on a particular date and time, while also informing Akal's employees that they would need to apply for employment at that meeting. No recipient of these communications could reasonably interpret them to be an

expression of intent to retain all Akal employees with the same employment terms as Akal had been providing.

Even for the West Texas Unit whose members did receive the notice after the transition letter, there is no basis for reaching a different conclusion. Both communications standing alone are entirely consistent with an intent to set new initial employment terms, especially in light of the Union's experience in the 6th Circuit. Moreover, the record leaves open the possibility that the transition letter and meeting notice were received on consecutive days, so that any purported confusion caused by the transition letter would have been immediately cleared up by the meeting notice.

The next step in Respondent's hiring process was the series of town hall meetings. The first was held on September 19 and the last on October 19. By the point in time of each town hall meeting, each Akal employee was aware that Respondent would be presenting information about its own benefits and policies at the meeting, and that he/she would need to bring specific credentials and documents and complete an employment application at the meeting if he/she wanted to be employed by Respondent. (Exceptions, ¶ 78). At each town hall meeting, in addition to other information, the PowerPoint presentation was used to thoroughly review the benefit plans offered by Respondent. (Resp. Prop. Ex. C; Sharp Aff., ¶¶ 5, 11.) In addition, Walden representatives conducting the meeting expressly advised attendees that respondent would not adhere to the terms and conditions of employment set forth in Akal's CBAs with the Union. (Sharp Aff., ¶11.)

Thus, as of September 19, 2015, the attendees at the first town hall meeting – and thus the Union itself – were aware, in no uncertain terms, that Akal employees would not be hired on the same terms and conditions that had been in effect under Akal. (Exceptions, ¶ 79). With the

attendees being given the opportunity to submit employment applications at the meetings, moreover, there can be no question that prior to being invited to accept employment (and, to be clear, the meeting attendees still had not been *offered* employment yet) the Akal employees had no reasonable expectation that employment with Respondent would be under the same terms and conditions of employment as under Akal. (Exceptions, ¶ 80). In fact, they were provided with clear information to the contrary.

Given the absolute clarity with which Akal employees were told at the town hall meetings that Respondent would be setting new initial employment terms, there is no basis in the record for finding that these employees had been induced into reliance on a mistaken belief that Respondent would be offering employment on the same terms as under Akal. (Exceptions, ¶¶ 13, 20). According to the Stipulated Record, the earliest possible date the predecessor employees received the transition letter and meeting notices was September 15, 2015, and these communications were distributed between that date and October 8. (SOF ¶ 5A.) This means that, as to the first town hall meeting (on September 19), the time elapsed between receipt of the communications and the meeting was, at most, 4 days, and it could have been as little as one day. For the September 20 town hall meeting, there was at most 5 days, and potentially as little as one day, between receipt of the communications and the meeting; for the September 21 meeting, there was at most 6 days and as little as one day between the receipt of the communications and the meeting; and so on. The same timeline applies to all of the town hall meetings between October 9 and 19.

In other words, even assuming, *arguendo*, that the transition letter and town hall notices created any confusion as to whether changed employment terms were portended, it was a matter of mere days before that uncertainty was resolved at the town hall meetings where Akal

employees were given clear and unequivocal notice that Walden would indeed set new initial employment terms on December 1, 2015. This means that these employees had anywhere from 6 weeks (from the last town hall meeting on October 19) to more than 10 weeks (from the first town hall meeting on September 19) to seek other employment before they ceased to be employed by Akal. This was ample time to consider other employment options and hardly the type of induced detrimental reliance that *Spruce Up* sought to protect against.

After the last town hall meeting, any applicant selected by Respondent for employment received an offer letter dated October 23, 2015. (Resp. Prop. Ex. D.) Included with the offer letter was a copy of Respondent's "Policies & Procedures" document. (Sharp Aff., ¶¶ 12-13.) The offer letter, the *first* invitation to accept employment with Respondent, provided, in part, as follows,

> Walden Security has repudiated the existing Collective Bargaining Agreement (CBA) between Akal and all unions or associations representing LCSOs/CSOs in the 1st, 5th and 8th Judicial Circuits and looks forward to negotiating new agreements with the unions and associations. In order for you to make an informed choice as to whether or not you wish to accept Walden Security's offer of employment we have enclosed for you our 1st, 5th and 8th Circuit Court Security Officer Policies and Procedures document that will be in effect on December 1, 2015 and continue until a CBA is negotiated and signed (Br. 1).

(Resp. Prop. Ex. D.)

Therefore, the first actual invitation to accept employment with Respondent informed each potential employee that Respondent was setting the initial terms and conditions of employment under which the potential employee would work and that those terms and conditions of employment would be different than the terms and conditions of employment under Akal. (Exceptions, ¶ 81.) Again, even if, for some inconceivable reason, an Akal employee somehow had not understood from the transition letter, meeting notice, or from the meeting itself, that any offer of employment would be on changed employment terms, that

erroneous belief – which could not possibly be attributed to Walden – was fully rectified by the October 23, 2015 offer letter with enclosed Policies & Procedures document. This information, moreover, was provided to the applying Akal employees more than 5 weeks prior to the start of employment with Respondent, leaving them ample time for "reshaping of personal affairs" before the end of their employment with Akal if they deemed Respondent's terms undesirable. *International Ass'n of Machinists and Aerospace Workers v. NLRB*, 595 F.2d 664, 674 (D.C. Cir. 1978).

In sum, the relevant evidence demonstrates that Respondent's hiring process was very much "in flux" from mid-September through at least the end of the town hall meetings if not the October 23 transmittal of offer letters and the accompanying "Policies & Procedures" document. (Exceptions, ¶ 20). No reasonable person could have expected that all Akal employees would be retained based on any communication from Respondent at any stage of this process, especially in light of the events in the 6th Circuit which themselves provided a clear and unmistakable portent of Respondent's plans regarding employment terms for the 5th and 8th Circuits. By the first town hall meeting, the UGSOA International Union itself – and thus all of its members at each of the Charging Party Local Unions – had notice of Respondent's intent to change employment terms as did every attendee of that meeting. Even if all other Akal employees are not charged with constructive notice based on the Union's actual notice from the first town hall meeting, the same notice was received by the attendees at each subsequent town hall meeting. Thus, Akal employees knew, anywhere from 6 to 10 weeks before Respondent took over operations, that they would be retained only on changed employment terms.

B. Even in the absence of the additional evidence offered by Respondent, the ALJ's Decision is still clearly erroneous.

Even without taking into consideration the additional evidence which demonstrates that the ALJ's Decision was not remotely grounded in the reality of Respondent's taking over the 5th and 8th Circuit contracts, the ALJ's Decision still must be reversed because it misconstrues the evidence and misapplies the law to the relevant facts.

To reach the conclusion that Respondent was a "perfectly clear" successor to Akal, the ALJ relied on a few scattered references in the transition letter to "our new security officers," "welcome you to our company" and that "you have joined" a premier security company, and an exhortation at the top of the meeting notice to "join our team!". (Exceptions, ¶¶ 36, 54, 64, 72). Based on these phrases, the ALJ concluded that the transition letter "overwhelmingly indicated that Respondent would be retaining Akal's workforce" and that the meeting notices "also manifested an intent to retain Akal's employees." (ALJ Decision at 12.) (Exceptions, ¶ 55). According to the ALJ, this purported expression of intent to retain all of Akal's employees rendered Respondent a "perfectly clear" successor.

That conclusion is based on a misreading of *Spruce Up* and its progeny. (Exceptions, ¶¶ 1, 9-11, 15). As previously discussed, in *Spruce Up* the Board held that the "perfectly clear" exception is "restricted to circumstances in which the new employer has either . . . misled employees into believing that they would all be retained without change in the wages, hours, or conditions of employment," or where the success employer has "failed to clearly announce its intent to establish a new set of conditions prior to inviting employees to accept employment." 209 NLRB at 195. Where the new employer "announces new terms prior to or simultaneously with his invitation to the previous work force to accept employment under those terms," the "perfectly clear" exception will not apply because in that case the new employer cannot be said

to plan to retain all of the predecessor employees due to the possibility that many will reject employment under the new terms. *Id.* Here, the ALJ misapplied two critical elements of the *Spruce Up* standard. (Exceptions, ¶¶ 9-11).

First, the ALJ overlooked that there was no "invitation to accept employment" in either the transition letter or the meeting notice. (Exceptions, ¶¶ 57, 74). While the transition letter did employ a couple of phrases seemingly suggesting the Akal employees had already joined Respondent, that was obviously just the hyperbole of an enthusiastic welcome letter and not an actual invitation – *i.e.*, an offer – to accept employment. (Exceptions, ¶¶ 54, 64). In that regard, the letter does not use the words "offer" or "accept," it does not advise recipients on how they could accept this purported offer, and it does not specify any employment terms. On the other hand, the letter does notify the recipient that Respondent would be providing information about such changed terms (*i.e.*, its own policies and benefits) in the coming weeks, thereby putting recipients on notice that such employment terms would be different from the terms in effect under Akal. (Exceptions, ¶¶ 58-59).

Further, the town hall meeting notice – which may have been received simultaneously with or even prior to the transition letter for all bargaining units but one – also specified that Akal employees would be able to apply for employment *at the town hall meeting*. (Exceptions, ¶ 77). Obviously, it is not possible for a person to receive an invitation to *accept* employment from an employer that is simultaneously asking that person to *apply* for employment. Accordingly, the transition letter could not reasonably be construed to be an invitation to *accept* employment when the contemporaneous town hall meeting notice specifically stated that recipients could *apply* for employment at the upcoming town hall meeting. Given that there was no invitation to accept employment contained in either the transition letter or the town hall

meeting notice, by definition there could not have been a failure to notify Akal employees of changed employment terms that would trigger the application of the "perfectly clear" exception. Therefore Respondent could not have been a "perfectly clear" successor under *Spruce Up*. (Exceptions, ¶ 10).

The second error committed by the ALJ in applying *Spruce Up* is her failure to recognize the significance of Respondent's statements, in both the transition letter and the meeting notice, portending that offers of employment, whenever they were to be made, would be based on new initial employment terms. (Exceptions, ¶¶ 9-10). As previously discussed, the letter and the notice both stated that Respondent would provide Akal employees with additional information about Respondent's policies and benefits. Those statements unquestionably indicated that (1) Respondent's policies and benefits would differ from Akal's – otherwise there would be no reason to present information about them to Akal's employees, and (2) employment with Respondent would be under those new Respondent policies and benefits, not those of Akal. Thus, the transition letter and the meeting notice clearly provided the "portent" of changed employment terms that is all an employer needs to provide to retain its *Burns* right and to avoid the "perfectly clear" exception. (Exceptions, ¶¶ 14, 60, 63). Even assuming, *arguendo*, that the hortatory remarks cited by the ALJ could be construed as expressing the intent to retain all Akal employees, the explicit references to changed policies and benefits satisfied *Spruce Up*'s test requiring the employer to announce its intent to establish new initial terms either "prior to or simultaneously with" any invitation to accept employment.

Remarkably, the ALJ held that these statements portending changed employment terms were not sufficient to avoid the narrow "perfectly clear" exception because the statements did not set forth "specific" changes to terms and conditions of employment. (Exceptions, ¶¶ 26-27, 31-

32); *see also id.* at 14 ("Moreover, Respondent did not announce any specific changes to employees' terms and conditions of employment concurrently with distribution of the transition letters or town hall notices"); *id.* at 13 ("However, Respondent did not mention any specific changes to employee terms and conditions of employment in these documents,"); id. at 13 ("Neither document mentioned any specific changes to the terms and conditions of employment enjoyed by employees under Akal.") In requiring an announcement of "specific" changes, the ALJ disregards the precedent of the Board and the courts holding that far less is needed: namely, a mere portent of changed employment terms, rather than the actual terms themselves. (Exceptions, ¶¶ 14, 26-27, 31, 34-35). In that regard, the D.C. Circuit in *S&F Market Street Healthcare LLC* v. *NLRB*, 570 F.3d 354 (D.C. Cir. 2009), expressly rejected a similar attempt, by the Board in that case, to expand the "perfectly clear" exception by requiring that the employer announce changes to "core" terms and conditions of employment. The court held that "the focus upon 'core' terms and conditions misstates the rule, which is that the successor employer must simply convey its intention to set its own terms and conditions rather than adopt those of the previous employment." 570 F.3d at 361. The "core" terms standard was incompatible with *Burns* because it presumed that the predecessor's employment terms must remain in effect unless the successor employer announced changes in "core" terms, whereas *Burns* held that the successor was free to set new initial terms unless it misled employees into believing their terms and conditions would continue unchanged. *Id.* Similarly, the ALJ's "specific changes" standard does the same violence to *Burns* as the "core" terms test, because under the ALJ's test an expression of intent to set new initial employment terms is not sufficient to retain the employer's *Burns* right.

The ALJ further misapplied Board law in distinguishing the instant case from *Paragon Systems, Inc.*, 364 NLRB No. 75 (2016). (Exceptions, ¶ 16). In that case, the Board held that the Paragon Systems was not a "perfectly clear" successor. Paragon Systems had been awarded a federal contract to provide security services for certain facilities. After being awarded the contract but before starting operations, Paragon posted a memo at the worksite advising the predecessor's employees that it had been awarded the contract and invited them to attend a job fair. The memo advised that Paragon was currently accepting applications from incumbent employees and that to be considered for employment, candidates must complete all parts of the application process. The memo directed applicants to bring certain identification documents and credentials to the job fair and noted that offers of employment would be "contingent upon successfully passing all pre-employment requirements, attending all scheduled training and passing all contract required performance standards." The Board held that Paragon was not a perfectly clear successor because the memo did not display an intent to retain predecessor employees. Rather, the memo was simply an invitation to complete an application which was necessary in order to be considered for employment.

Here, the transition letter was neither an invitation to apply for employment nor an offer of employment. (Exceptions, ¶ 57). It was merely an introductory clearly designed to encourage Akal employees to *seek* employment with Respondent. (Exceptions, ¶ 58). At the same time, the letter indicated that there would be changed employment terms and that more information would follow. (Exceptions, ¶ 60). Like the memo in *Paragon Systems*, the town hall meeting notice here, which may have been distributed prior to or concurrently with the transition letter for all but one bargaining unit, specifically referred to the need to complete an application and listed

the specific documents and credentials that applicants would need to supply. (Exceptions, ¶¶ 77-78, 80).

Thus, the Akal employees here were in a similar position as the predecessor employees in *Paragon Systems*; they knew that a new contractor would be taking over their operation, and they knew they would have to submit an application to be considered for employment with the successor employer. The ALJ found it significant that the memo in *Paragon Systems* explicitly stated that all parts of the application needed to be completed to be considered for employment, while Walden's town hall notice did not contain that specific injunction. This is a meaningless distinction; the reference to completing an application in Respondent's town hall meeting notice can be interpreted as requiring the same thing as the memo in *Paragon Systems* – namely, that "all parts" of the application would need to be "completed" in order to be considered for employment (hence the directions regarding bringing all necessary identification cards and credentials).[7]

C. The Union's admitted expectation that Respondent would seek a change in the unit description independently precludes application of the "perfectly clear" exception.

The unit descriptions in effect for the Charging Party Local Unions prior to Respondent's taking over the 5th and 8th Circuit contract all included, in addition to the CSO and Lead CSO classifications, the classifications of Special Security Officer ("SSO") and Lead Special Security

[7] The ALJ's reliance upon *Creative Vision Resources, LLC*, 364 NLRB No. 91 (2016), *Nexeo Solutions, LLC*, 364 NLRB No. 44 (2016), and *Adams & Associates, Inc.*, 363 NLRB No. 193 (2016) was equally misguided. (Exceptions, ¶ 17). The ALJ found those cases to be factually analogous to the instant case only by misconstruing the transition letter and meeting notice, in the manner discussed above, as failing to indicate an intent to change employment terms.

Interestingly, in *Nexeo Solutions*, the successor employer made a statement to predecessor employees that it was still working on a compensation and benefits package and which would be shared at some point in the future. As then-Member Miscimarra noted in his dissent, that statement was sufficient to put the employees on notice of changed employment terms. 364 NLRB no. 44, slip op. at 18, 22. Similarly, the references here in the transition letter and meeting notice to Akal's employees learning about Respondent's benefits in the near future likewise put them on notice of Respondent's intentions.

Officer ("LSSO"). In earlier negotiations between the International Union and Respondent in the 6th Circuit, Respondent sought to remove the SSO and LSSO classifications from the unit descriptions for the UGSOA-represented bargaining units in that circuit. (SOF ¶ 5M.) A tentative agreement was reached on that issue, and the Stipulation of Facts includes the Union's admission that it assumed Respondent would seek the same change from its 5th and 8th Circuit Local Unions once Respondent took over operations in that circuit. (*Id.* at ¶ 5M, 5N.) Given that the Union undisputedly believed Respondent intended to change something as fundamental as the unit description, the Union cannot also argue that it believed Respondent was not intending to change employment terms. This too should have precluded application of the "perfectly clear" exception.

The ALJ did not dispute the notion that an intent to change the unit description would preclude "perfectly clear" successor status. Rather, the ALJ held that Respondent failed to announce that it intended to seek that change and as a result it could not avoid "perfectly clear" successor status. According to the ALJ, the Union's "assumptions do not equate to an announcement that Respondent sought to change the description of the bargaining units at issue here." (ALJ Decision at 14.) That reasoning is incompatible with the rationale behind the "perfectly clear" exception as articulated by the Board in *Spruce Up* and other cases – namely, to prevent adverse reliance upon an erroneous belief that the successor employer intended to maintain the predecessor's status quo, caused by either the employer's misleading statements or its failure to announce its intent to make changes prior to offering employment.

The successor is ordinarily required to announce its intent in order to ensure that the predecessor employees are on notice that changes to employment terms will be made. But where, as was the case here, the Union *admits* that it expected the successor employer to make certain

changes, by definition that means the employees did *not* believe the successor employer intended to preserve the predecessor's status quo which vitiates the possibility of adverse reliance on an erroneous belief about the successor's intentions. Thus, the ALJ should have found that the Union's admitted expectation that Respondent would seek to alter the unit description was, by itself, a sufficient basis for avoiding "perfectly clear" successor status.

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Board grant its Exceptions and overturn the ALJ's Decision.

Dated: Baltimore, Maryland
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